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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WILLIE JEROME RICHARDSON, Defendant and Appellant.	B165297 (Super. Ct. No. BA211351)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith L. Champagne, Judge. Reversed and remanded.

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

Willie Jerome Richardson challenges the trial court's reinstatement of the original judgment of conviction in this case, following remand for further proceedings with regard to his *Pitchess*[1] discovery motion. He also claims the court erred in its calculation of conduct credits for the period between our conditional reversal of the judgment in his earlier appeal and the reinstatement of the judgment of conviction. We reverse the judgment and remand for further proceedings.

FACTUAL AND PROCEDURAL SUMMARY

On December 19, 2000, Los Angeles Police Officers Jonathan Pultz and Tae Kim stopped appellant after a "wants and warrants check" revealed two misdemeanor warrants attached to the vehicle he was driving. When the officers learned that appellant was on probation, they instructed him to get out of the vehicle. He complied, but became "very agitated." He began moving his hands in and out of his pockets, removing and replacing items, including a crumpled brown paper bag.

As Officer Pultz approached appellant to search him, appellant started running. Pultz caught up with appellant, who attempted to punch him. In the resulting struggle, appellant struck Officer Pultz. Officer Kim came to Pultz's assistance. Pultz held appellant's torso and Kim grabbed appellant's ankles and knees. As back-up units were arriving, appellant reached into his pocket and discarded the crumpled brown paper bag under an adjacent vehicle. The officers retrieved the bag and discovered two rocks of cocaine inside.

Appellant was charged with possession of cocaine (Health & Saf. Code, § 11350, subd. (a)), resisting an executive officer (Pen. Code, § 69),[2] and two counts of battery on a peace officer (§ 243, subd. (b)). In preparation for trial, appellant filed a *Pitchess* motion, seeking disclosure of complaints or discipline against Officers Pultz and Kim.

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

[2] All further statutory citations are to the Penal Code unless otherwise indicated.

The court reviewed the documents in camera, and found none were relevant or discoverable. At a second in camera hearing, the court released the use of force report from appellant's arrest.

Appellant was convicted by jury of possession of cocaine, resisting an executive officer, and misdemeanor battery on Officer Pultz. He was acquitted of misdemeanor battery on Officer Kim. In his appeal from the judgment of conviction (case No. B149794), appellant asked this court to review the transcripts of the in camera proceedings and the documents produced in response to the discovery motion. Because the transcripts referred to documents that were not specifically identified, we ordered the District Attorney and the Los Angeles Chief of Police to produce for this court all documents produced for the in camera hearings. We then ordered the trial court to settle the record as to which documents it had reviewed during the in camera hearings.

This resulted in the discovery of a single complaint in Officer Pultz's file which, according to the trial court, "appear[ed] to be . . . relevant [and] discoverable" but which had not been "made available for the trial court's review." We were unable to determine from the record before us on appeal whether discovery of the complainant or of the complaint itself would have led to relevant, admissible evidence, or whether there was a reasonable probability that a different result would have been obtained at trial if the evidence had been provided. For that reason, we ordered a conditional reversal of the case on the *Pitchess* issue. On remand, appellant was to be afforded a reasonable opportunity to demonstrate that he had been prejudiced by not receiving the information in that complaint before trial.

On November 14, 2002, the court ordered disclosure of the name, address and telephone number of Eddie Wyatt, the complainant against Officer Pultz. Defense counsel was given time to conduct an investigation of the complaint. The defense investigator was unable to locate Wyatt. In December 2002, appellant brought a supplemental *Pitchess* motion, seeking "verbatim copies of all statements made by" Eddie Wyatt, based on the investigator's inability to locate Wyatt from the information provided. At a hearing on January 13, 2003, the court ordered the City Attorney to

provide additional information -- two possible dates of birth for Wyatt. Defense counsel argued that he was also entitled to the actual complaint. The court replied: "Once you have done what you are required to do to demonstrate due diligence, if that proves ineffective, then you very well may be entitled. First you are going to have to show due diligence, which at this stage has not been shown."

The following day, appellant filed a declaration by his investigator setting out the steps taken to locate Eddie Wyatt. The court concluded appellant had established that he had done a diligent search. With that, the City Attorney stated, "The motion was for Mr. Wyatt's statement which, given the court's indication, we don't have any problem. I will ask the custodian if she can drop it off in this courtroom or tomorrow morning." The documents provided to appellant showed that Wyatt made his complaint against Officer Pultz in a February 2000 police interview. According to the summary of the report provided to the defense, the morning after Wyatt was booked at the 77th Street Jail, he complained that Pultz and another officer chased him, and one of the officers pushed him to the ground. He also alleged he was struck in the face and kicked, but he did not know which officer struck or kicked him. Wyatt was re-interviewed at his residence on February 5, 2001, and recanted his entire prior statement and complaint. He said he made the false complaint because he was angry about being arrested.

On February 5, 2003, appellant moved for dismissal of the information or for a new trial and sanctions, on the ground that the Los Angeles Police Department had withheld crucial witness information and thereby denied him a fair trial. He set out the chronology of events: his first *Pitchess* motion was filed on January 25, 2001, 11 days before Wyatt's second interview, and was heard on February 23, 2001, 17 days after the interview. Had information about Wyatt's complaint been timely provided to appellant in response to his *Pitchess* motion, appellant would have been able to find, interview, and subpoena Wyatt, since at that time the police had a current correct address for him. Because of the police department's delay in complying with its discovery obligations, Wyatt was no longer at that address, and could not be found through reasonable

diligence. Appellant argued that he would have been able to establish a pattern of misconduct and impeach Officer Pultz if Wyatt had testified at trial.

Appellant's motion was heard on February 24, 2003. After reviewing the information about Wyatt's complaint and subsequent recantation, the court concluded: "If Mr. Wyatt had given testimony at the defendant's trial, both the initial equivocal statement and the subsequent recantation would have, so far as this court can tell, done very little to impeach Officer Pultz or establish any pattern of misconduct. Assuming that Wyatt had been willing to testify, this type of evidence could hardly be described as crucial. The court determines it would have had no impact on the ultimate outcome of the trial. The claim of prejudice by untimely disclosure is based on sheer speculation. It is unsupported by the facts and the motion to dismiss or to grant a new trial is denied." The court then computed appellant's new conduct credits. This is a timely appeal from the court's order.

DISCUSSION

I

Appellant claims the trial court erred by not ordering the prosecution to disclose verbatim copies of the complainant's statements. In his supplemental *Pitchess* motion filed on December 30, 2002, appellant requested "verbatim copies" of all statements made by Wyatt. Yet he raised no objection to the documents that were ultimately provided to him -- a redacted summary of Wyatt's February 2000 interview and February 2001 re-interview. He utilized these documents to support his motion to dismiss, and presented absolutely no argument about their inadequacy or incompleteness. His only claim was that they were provided too late.

Respondent argues, and we agree, that any deficiency should have been raised in the trial court, where it could have been remedied. (See *Carruthers v. Municipal Court* (1980) 110 Cal.App.3d 439, 442 [defendant entitled to seek additional discovery if information provided proves inadequate.]) Because he did not, the issue is forfeited. (See *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 402.)

II

Appellant claims he was prejudiced by the prosecution's failure to turn over information regarding Wyatt's complaint against Officer Pultz before trial. The test for prejudice from denial of *Pitchess* discovery is whether "there was a reasonable probability that the outcome of the case would have been different had the information been disclosed to the defense." (*People v. Hustead* (1999) 74 Cal.App.4th 410, 422.) Appellant asserts the failure to make a timely disclosure of Wyatt's complaint violated his rights under *Brady v. Maryland* (1963) 373 U.S. 83, 87. "Under *Brady*, . . . the prosecution must disclose to the defense any evidence that is 'favorable to the accused' and is 'material' on the issue of either guilt or punishment. Failure to do so violates the accused's constitutional right to due process. [Citation.] Evidence is material under the *Brady* standard 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' (*United States v. Bagley* (1985) 473 U.S. 667, 682 [105 S.Ct. 3375, 3383, 87 L.Ed.2d 481].)" (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 7-8.) "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (*Kyles v. Whitley* (1995) 514 U.S. 419, 434.)

We first look at the information which was not disclosed to appellant before his trial, Eddie Wyatt's complaint of excessive force during an arrest by Officer Pultz. In his February 21, 2000 complaint against Officer Pultz and another officer, Wyatt stated that he panicked when he observed police behind him, and exited his vehicle and ran. Pultz and the other officer chased Wyatt, and one of them, "whom he thought was possibly Officer Pultz, pushed him to the ground from behind. Both Wyatt and that officer hit the pavement and Wyatt was face down."

According to the summarized complaint, while Wyatt was on the ground and Pultz and the other officer were attempting to handcuff him, "he was struck in the face with the fists of the officers four or five times. Wyatt said that both sides of his face were struck and that he did not know which officer struck him." Wyatt also said that while he was on the

ground, he was kicked approximately four times in his rib cage by either Pultz or the other officer. Wyatt did not complain to a supervisor about the incident until the morning after, "when he began to hurt badly." He received medical treatment for a laceration to his forehead.

In appellant's case, the officers testified that appellant attempted to run from them and Officer Pultz tackled him and brought him to the ground. Officers Pultz and Kim testified that appellant struck Pultz and kicked at them both. This was the conduct which led to the charges of resisting an executive officer and battery on a peace officer. Appellant's defense was lack of officer credibility. In his *Pitchess* motion, appellant's counsel stated the defense was expected to be that the officers used unjustifiable and excessive force and falsified the police report to justify their actions, and that any resistance offered by appellant was in response to those actions. In his opening statement at trial, defense counsel argued that appellant had complied with the officers' instructions, that Officer Pultz had tackled appellant without provocation, and that appellant was not wearing a black jacket when arrested, did not reach into any pocket, and never pulled out a brown paper bag and threw it. In his closing, defense counsel again argued: "Now this case is officer credibility. If you cannot believe these officers, then you must find my client not guilty."

The jury apparently did not credit Officer Kim's testimony that appellant kicked him; appellant was found not guilty of battery on Officer Kim. Had appellant known of Wyatt's complaint, he might have obtained Wyatt's testimony that Officer Pultz used excessive force during his arrest.[3] This evidence would have supported appellant's defense that Pultz used force on him, without provocation, then falsely reported and falsely testified that the force was justified by appellant's conduct. Without Wyatt, appellant had no witnesses to support his credibility challenge.

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[3] Although Wyatt was not sure which officer did what, he thought it was Pultz who pushed him to the ground, and he stated that the officers (plural) struck him with fists while he was on the ground.

Respondent argues there could not be prejudice because Wyatt recanted his entire prior statement and complaint. This occurred in a second interview which took place at Wyatt's residence almost a year later, on February 5, 2001. According to the summary of this interview, Wyatt stated he was never pushed when he ran from Pultz and the other officer; he tripped and fell either on an island in the parking lot or on some oil and water. He stated that he fell head first into a trash can, which caused the laceration to his forehead. Wyatt said he was not punched or kicked by either officer, and that he was simply handcuffed and placed inside a police car. He explained that "he made the false complaint because he was mad and angry at the whole situation of being arrested." Wyatt stated "that the officers just did their jobs that night and that he wanted to end this entire complaint."

The fact that Wyatt recanted does not necessarily negate the significance of his earlier complaint. "It has long been recognized that 'the offer of a witness, after trial, to retract his sworn testimony is to be viewed with suspicion.' [Citations.]" (*In re Roberts* (2003) 29 Cal.4th 726, 742.)[4] When a witness makes inconsistent declarations, "it is clear that he has lied at some point." (*Id.* at p. 743.) It may not be clear, however, which statement is true and which is false. (*Ibid*.) The trier of fact, charged with the evaluation of the credibility of witnesses (see *People v. Jackson* (1992) 10 Cal.App.4th 13, 20), could have found Wyatt's original complaint true and the recantation false. Wyatt's recantation followed almost a year after he first made his complaint about Pultz and the other officer. This second interview was conducted at his residence, 11 days after appellant filed his *Pitchess* motion. The timing of this second interview raises at least a suspicion about the truth of the recantation and the circumstances under which it was given.

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[4] Wyatt's complaint was neither a sworn declaration nor sworn testimony at trial. But at the time of the interview in which he made his complaint, he signed a section 148.6 form, which warned: "It is against the law to make a complaint that you know to be false. If you make a complaint against an officer knowing that it is false, you can be prosecuted on a misdemeanor charge." While not an oath, this warning nevertheless adds weight to the credibility of Wyatt's initial complaint.

As we have explained, appellant's defense was based on officer credibility, yet he was deprived of information which could have led to admissible evidence to impeach Officer Pultz. Had appellant been given information about Wyatt's complaint before trial, he could have located Wyatt and decided whether to call him to testify about the alleged use of force by Pultz during his arrest. Without that potentially helpful information, appellant had no defense witness to support this theory, and was denied his right to "a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." (*Pitchess, supra*, 11 Cal.3d at p. 535.) There is a reasonable probability that there would have been a different result had the information been provided to appellant. In the absence of this information, appellant did not receive a fair trial resulting in a verdict worthy of confidence. (*Kyles v. Whitley, supra*, 514 U.S. at p. 434; *Strickler v. Greene* (1999) 527 U.S. 263, 289-290.) Appellant suffered prejudice from the failure to provide this discovery, and his conviction must be reversed and the cause remanded for further proceedings.

If appellant is tried again and cannot, through reasonable diligence, locate Eddie Wyatt, the court is directed to exercise its discretion to determine an appropriate remedy for the prosecution's discovery violation. (See *People v. Memro* (1995) 11 Cal.4th 786, 831.)

In light of our reversal of the judgment, it would be premature to adjudicate appellant's right to custody credits following our conditional reversal in his earlier appeal.

DISPOSITION

The judgment is reversed and the cause remanded for further proceedings consistent with the views expressed in this opinion.

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EPSTEIN, Acting P.J.

We concur:

HASTINGS, J.

CURRY, J.